

**HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 113 OF 1991.

Smt. Vimalabai Fakirchand Kumar & Anr.

..Appellants.

Versus.

The Western India Trust
& Ors.

..Respondents.

Shri. H. S. Keluskar for Shri. N. V. Walavalkar
for the Appellants.

CORAM: ANOOP V. MOHTA, J.

DATE : DECEMBER 7, 2005.

P.C.

1. This is a Surety's First Appeal, whereby challenge has been made to the judgment and order dated 13th October 1989 whereby the Second Joint Civil Judge, Senior Division, Satara, after considering the issues has directed the Opponent to pay the future mesne profit at the rate of Rs.500/- from 28.06.1969 to 7.08.1978. The Court has further directed the opponent to pay Rs. 52,166/- and passed the consequential orders.

2. The appellants admittedly stood surety for Opponent No.1, i.e., respondent No.2 in a proceeding initiated by respondent No.1. As a condition precedent of depositing and furnishing security to the tune of

Rs.50,000/- by two sureties, each of Rs. 25,000/-, the opponent, i.e., appellant Nos. 1 & 2 stood as sureties as per the directions given by the High Court. The order for determining the future mesne profit was passed in the appeal. Respondent No.1 therefore preferred an application for determining future mesne profits as contemplated under Order -XX Rule 1(c) of the Code of Civil Procedure. There is no further dispute that the premises in question is a Cinema Theatre.

3. The trial Court, therefore, after assessing the material on record passed the impugned judgment and order and directed the appellants to make the payment.

4. None appears for the respondent.

5. The Counsel appearing on behalf of the appellants basically contended that the liability as awarded should have been firstly executed against the main creditor and not against the sureties. However, he was unable to support his submission, except the oral arguments. The law is settled to this extent that money claim can be executed as per the decree against the guarantor or sureties.

6. In the present case, admittedly, the action was initiated only against the appellant being original sureties. There is nothing perverse or contrary to that regard or born out from record. In the absence of any material evidence led by the contesting parties, i.e., the Opponent No. 1, i.e., guarantor, the material available on record justify the impugned judgment and order. Admittedly, while admitting this appeal there was no interim order sought or granted by this Court. There is no further dispute in this matter that the appellants remained absent and never entered into witness box to oppose the contention as raised. There was nothing justified at a relevant time why the surety bond should not be cancelled. In view of this background, there is nothing which need to interfere with the finding given by the lower court.

7. Taking all this into account, the First Appeal is dismissed. No order as to costs.

(ANNOP V. MOHTA, J.)